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SEP 10 2004

NO. 04-47

IN THE

Supreme Court of the United States

UNION PACIFIC RAILROAD CO.,

Petitioner,

v.

CHRIS BARBER, CLAUDETTE BARBER, AND ALLIED WASTE INDUSTRIES, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether—in the face of Union Pacific's concession that "a ratio of five times the compensatory award is . . . within constitutional bounds in a personal injury case"—the Arkansas Supreme Court erred in holding that the punitive damages award here conformed to due process.

2. Whether the Arkansas Supreme Court erred in rejecting Union Pacific's sufficiency of the evidence challenge to the jury verdict below.

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Respondents Chris and Claudette Barber ("the Barbers") oppose the Petition for a Writ of Certiorari. Petitioner Union Pacific Railroad Company ("Union Pacific" or "the railroad") seeks to obtain review of multiple legal issues that it did not properly preserve or present to the Arkansas Supreme Court. Most importantly, the railroad conceded below that the ratio of compensatory to punitive damages awarded in this case fell within the limits permitted by this Court's precedent, but now offers argument entirely contrary to its prior position as the cornerstone of its due process challenge. In addition, the railroad attempts to recast its challenge to the sufficiency of evidence before the Arkansas court into a new preemption argument—one that it does not even claim presents a question on which there is any division of authority among the lower courts. Because Petitioner expressly waived below the due process argument that it now presses most vigorously—and because, as to both issues raised by Petitioner, the Arkansas Supreme Court's application of settled principles to the facts was correct and implicates no disagreement among the lower courts—the Petition should be denied.

COUNTER STATEMENT OF THE CASE

Factual Background

On January 19, 1998, an eastbound Union Pacific train struck a garbage truck driven by Charles Rolfe at County Road 123 in St. Francis, Arkansas. Rolfe died at the scene from his injuries, and his passenger, Respondent Chris Barber, suffered partial paraplegia, multiple fractures of his skull and spine, ruptured disks at C6 and C7 requiring fusion, permanent brain damage, multiple ankle breaks and rib fractures, and various other injuries. Barber was released after two months in a hospital and rehabilitation center, and was given a 70% permanent impairment rating. He suffers from continuing pain (the touch of long pants or even bed sheets to his legs evokes a searing sensation) and

bowel and bladder problems, and will require medication, physical therapy, and medical treatment for the rest of his life. Now age 39, he cannot walk unassisted and cannot work.

Evidence at trial established that the crossing's conditions were so hazardous that four "near-misses" involving cars and smaller trucks had occurred there in the year prior to the Barber accident. Abst. 49-50, 56-58 (Susan and Vernon Thweatt); Abst. 59-60 (Troy Meredith); Abst. 61-62 (two near misses involving Ray Thweatt). At 50 feet from the crossing, vegetation was so dense that motorists could see only about 63 feet to the east and 270 feet to the west, even though Arkansas law required 1000 feet of visibility in both directions. Abst. 153-155. To get a clear view down the tracks, drivers had to inch forward into the zone of danger and tended to focus their attention to the east because the view was most restricted in that direction. Abst. 44-47, 51, 53, 57, 59-61, 75, 154-156, 159, 163. Moreover, large trucks often needed 15 to 20 seconds to clear the tracks because the crossing was humped 53 inches above the highway, a condition that was contributed to by Union Pacific's maintenance practices. Abst. 45, 61, 155-156, 4-SAB, 5-SAB. Chuckholes, deteriorated ties, and problems with rails sticking up above the surface of the crossing also made passage rougher and contributed to the hazardous nature of the crossing. Abst. 59, 78, 83, 113-115, 120, 2-SAB.

Prior to the accident, Willie Savage, foreman of a Union Pacific maintenance gang, considered the crossing so hazardous that he personally drove his supervisor to the site to point out the problems. The supervisor responded, "We can't do nothing about that, because we are getting paid to put in ties. We ain't getting paid to fix crossings." The supervisor did order a flagman to be posted temporarily to ensure that workers and equipment could cross safely, but nothing was done to fix the problems. Abst. 90-91. Similarly, the local mayor and a garbage truck driver for

another company testified about making, collectively, at least a dozen complaints about the crossing to Union Pacific employees. They contacted individuals ranging from Union Pacific vice presidents and state crossing safety coordinators to 1-800 hotline operators, without receiving any response. Abst. 76-77, 83-85. Union Pacific received a bid from Tweedy Contractors in 1997 to clear vegetation from the crossing for $1,465—two to three times as much as for crossings on other Union Pacific subdivisions in Arkansas—but never funded the project. Abst. 117-118; Add. 527.

During discovery, Union Pacific failed to turn over other evidence that certainly would have reflected its knowledge of hazardous conditions and election to ignore those problems prior to the accident, as well as a voice tape of the train crew's call to dispatchers immediately after the accident. Although the railroad preserves and uses voice tapes to support its positions in litigation, the tape in question was destroyed. Track inspection records were also destroyed three months after the Barbers' counsel filed a discovery request for them. Finally, although "slow orders"[1] that would have reflected maintenance needs would normally have been available by computer, Abst. 174, the railroad did not produce them in response to the Barbers' discovery requests. Instead, the Barbers' investigators found evidence that slow orders had been imposed on the crossing mixed in with documents produced in connection with another case.

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[1] Slow orders instruct trains to reduce speed below normal federal requirements. They can be issued when a track is out of compliance with federal track regulations, remaining in place until a defect is fixed, or for reasons such as maintenance work being performed in a particular area. 49 C.F.R. §§ 213.5, 213.9. Accordingly, slow orders identify maintenance needs and appropriate corrective actions.

Other evidence from Union Pacific employees and experts suggested that the railroad's repeated failure to respond to complaints about the crossing prior to the accident was due to a deliberate decision not to spend money on maintenance, Abst. 91 (Willie Savage testimony that "What I learned about working for Union Pacific and complaining about vegetation was, do what you were told and ask no questions."), or improvements to crossings that are not covered by federal and state enhancement programs. *See* Abst. 143-144 (testimony by Union Pacific's Manager of Industry and Public Projects for Arkansas that "I suppose somebody back in Omaha made a decision that they weren't going to independently fund upgrades in Arkansas. I don't know why the railroad won't spend money to upgrade crossings like County Road 123."); Abst. 128, 131 (testimony of expert Harvey Levine based on review of various railroad documents that "For years now, it has been traditionally Union Pacific's policy that that federal program is solely responsible for determining the safety needs at those crossings and then providing the funding to install safety devices."). Dr. Levine, a railroad economist, also testified that Union Pacific estimates the claims that it will pay out every year, shares the information with the Association of American Railroads, and factors those estimates into its budgeting process. Abst. 132.

Procedural Background

The Barbers filed a complaint against Union Pacific, train engineer L.E. Piper, Jr., and Asplundh Brush Control Company on October 19, 1998. They alleged that the accident was caused by Union Pacific's failure to control vegetation within its right-of-way in violation of Arkansas Code § 23-12-201, failure to alleviate an abnormally dangerous crossing, failure to sound audible warning devices properly, failure to keep a proper look out, and operating the train at an excessive speed given the crossing's conditions. The Barbers later nonsuited the case against Asplundh. On

February 12, 2001, the Barbers amended their complaint to request punitive damages as well as to allege that Union Pacific negligently failed to maintain the track to the Federal Railroad Administration's Class 4 standards and to issue a slow order imposing a speed restriction over the crossing.

After a ten-day trial, the jury found in favor of the train engineer, but returned a general verdict finding Union Pacific guilty of negligence. The jury also returned a special interrogatory finding that punitive damages were warranted because the railroad had acted with malice or such reckless indifference to probable injury that malice could be inferred. The jury awarded $5 million in compensatory damages to Mr. Barber and $100,000 to his wife; upon further deliberations, the jury assessed $25,000,000 in punitive damages against the railroad.

Upon appeal to the Arkansas Supreme Court, Union Pacific asserted that the trial court erred in denying its motion for a directed verdict on the claim of negligent failure to issue a slow order and the existence of an abnormally dangerous crossing as not supported by substantial evidence; challenged the punitive damages award as excessive under both state common law and federal due process; and asserted a number of other issues that are not raised in its Petition for a Writ of Certiorari. Concerning federal due process, the railroad's two-page argument asserted briefly that the punitive damages award should be struck down as (1) disproportionate to the reprehensibility of its conduct and the fines imposed under Arkansas statute; and (2) resting on evidence of Union Pacific's national policies rather than conduct within the state of Arkansas. Union Pacific conceded, however, that the award was not disproportionate to the compensatory damages awarded in the case. Abst. 232-233.

The Arkansas Supreme Court rejected both of Union Pacific's contentions. In reviewing the directed verdict challenge, the court noted that the railroad did not dispute the sufficiency of evidence supporting the general verdict or any of the jury instructions on legal grounds, but rather challenged only the sufficiency of evidence underlying two of several theories of negligence. It relied on Arkansas precedent to hold that a challenge to the sufficiency of evidence supporting a particular theory of negligence will be rejected where evidence supporting other theories was sufficient to uphold the verdict. *Union Pac. R.R. Co. v. Barber*, No. 03-57, 2004 WL 352525 at 9, Pet. App. 19a-21a (Ark. Feb. 26, 2004) (citing *Union Pac. R.R. Co. v. Sharp*, 952 S.W.2d 658 (Ark. 1997)). Regarding punitive damages, the court held that the award did not shock the conscience under state standards and met federal due process requirements because the degree of reprehensibility was high, single-digit ratios between compensatory and punitive damages are generally permissible, and the award was reasonably comparable to the maximum aggregate federal and state fines that could be imposed for each day that Union Pacific had controlled the tracks up to the January 1998 accident.

Union Pacific then filed a petition for rehearing asserting that its slow order challenge had been the equivalent of a challenge to the jury instructions. The Arkansas Supreme Court denied the petition without an opinion.

REASONS FOR DENYING THE WRIT OF CERTIORARI

I. UNION PACIFIC'S PRIMARY CHALLENGE TO THE PUNITIVE DAMAGES AWARD WAS WAIVED BELOW—AND PROPERLY SO IN VIEW OF THE SOUNDNESS OF THE TRIAL COURT'S RULING.

This Court explained in *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 568 (1996), and *State Farm Mutual Automobile Insurance Company v. Campbell*, 538 U.S. 408, 416 (2003), that the Fourteenth Amendment's Due Process Clause forbids the imposition of "grossly excessive" punitive damages by state courts. Courts reviewing punitive damages awards must therefore not only assess the nature and strength of state interests in deterring the conduct at issue, but also the proportionality of the damages in comparison to (1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages awarded; and (3) the difference between the punitive damages awarded and civil penalties authorized or imposed in comparable cases. *State Farm*, 538 U.S. at 418; *Gore*, 538 U.S. at 568, 575.

The courts below correctly and faithfully applied these principles. The alleged splits between the Arkansas Supreme Court and the Ninth and Eleventh Circuits are illusory—the cases are easily reconciled on their facts and legal holdings. And in any event, the primary basis on which certiorari is sought—the 5-to-1 ratio between the punitive award and compensatory damages—was waived in the Arkansas Supreme Court. In short, the due process issue was properly decided below, does not involve any division of authority, and in any event was in large part waived below—making this case a singularly improper vehicle to "further illuminate the character of the standard that will

identify unconstitutionally excessive awards of punitive damages." Pet. 11 (quoting *Gore*, 517 U.S. at 568 (quoting *Honda Motor Co. v. Oberg*, 512 U.S. 415, 420 (1994))) (internal quotation marks omitted).

A. Petitioner's Principal Argument Was Waived Below.

The primary argument advanced in Union Pacific's Petition (Pet. 2, 10-11, 13-17) is its assertion that the Arkansas Supreme Court failed to heed the statement in *State Farm* that "[w]hen compensatory damages are substantial, then a lesser ratio [of punitive damages], perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." 538 U.S. at 425.

The railroad, however, flatly waived this argument below by conceding in its opening brief to the Arkansas Supreme Court that "a ratio of five times the compensatory award is . . . within constitutional bounds in a personal injury case." Abst. 232 (citing *State Farm*, 538 U.S. at 425). Accordingly, Union Pacific contended only that the punitive award in this case violated "the first and third *Gore* criteria." Abst. 232. Union Pacific never argued—or even suggested—to the Arkansas Supreme Court that the ratio of compensatory to punitive damages raised any question at all under this Court's decision in *State Farm*. Accordingly, in the face of the railroad's concession on this point, the Arkansas Supreme Court's opinion devoted only a few cursory sentences to the ratio factor; the court noted that the 5-to-1 ratio was consistent with *State Farm*'s guidance that single-digit ratios usually comply with due process requirements, but did not address this Court's discussion of 1-to-1 ratios.

The Petition essentially sandbags the Arkansas Supreme Court, contending that the decision below should be reversed because the court should have interpreted *State*

Farm as limiting damages to a 1-to-1 ratio—a ground expressly disclaimed below. Permitting the railroad to advance that argument in this Court is directly contrary to traditional practice: "Although in some instances [the Supreme Court has] allowed a respondent to defend a judgment on grounds other than those pressed or passed upon below, it is quite a different matter to allow a petitioner to assert new substantive arguments attacking, rather than defending, the judgment when those arguments were not pressed in the court whose opinion we are reviewing, or at least passed upon by it." *United States v. United Foods, Inc.*, 533 U.S. 405, 416-17 (2001) (citation omitted). *See also, e.g., Sprietsma v. Mercury Marine*, 537 U.S. 51, 56 n.4 (2002) (argument not raised below is waived).

Indeed, under "well settled" doctrine animated by federalism concerns, this Court does not review the final judgments of state courts unless "'the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system.'" *Board of Dir. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 549-50 (1987) (citation omitted). Where a state supreme court's opinion is silent on a federal issue, this Court properly assumes that the issue was not properly presented and will not grant a writ of certiorari unless the petitioner demonstrates that the state court had "'a fair opportunity to address the federal question that is sought to be presented.'" *Adams v. Robertson*, 520 U.S. 83, 86-87 (1997) (per curiam) (citation omitted) (dismissing writ of certiorari as improvidently granted). It thus follows *a fortiori* that where the ground advanced in the petition was expressly disclaimed below, the case is an improper one for certiorari.

Accordingly, even if there were disagreement in the lower courts about the application of the *Gore/State Farm* analysis (and, as demonstrated below, there is not), this case does not present this Court with a suitable vehicle to

address these issues. If the Court were to decide to revisit the constitutional issues addressed in *Gore* and *State Farm*, it would be far more appropriate to do so in a case in which the constitutional challenge was fully and fairly presented to the courts below. This case certainly presents no circumstances that would justify a departure from the Court's traditional practice of declining to review an issue that was explicitly conceded below.

B. Petitioner Has In Any Event Failed To Identify Any Split In Authority Involving The Opinion Below.

The Arkansas Supreme Court's decision implicates no split in authority among the lower courts.

Union Pacific misconstrues a brief reference to state common-law standards in the conclusion of the Arkansas court's excessiveness analysis, *see Barber*, 2004 WL 352525 at 16-17, Pet. App. 36a,[2] in a vain attempt to portray the court's federal due process analysis as conflicting with the

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[2] Union Pacific points to a statement that "we will not substitute our judgment for that of the jury" located in a standalone paragraph at the end of the court's excessiveness analysis. Although the court admittedly did not provide a clear transition into the paragraph, the passage appears to respond to Union Pacific's *separate* argument that the punitive damages award violated state standards as well as federal. *Compare* Abst. 231-232 (briefing on state issues), *with* Abst. 232-233 (federal). The paragraph applies a state "shock the conscience" standard as articulated in two cases that contain no federal analysis whatsoever. *Harold McLaughlin Reliable Truck Brokers, Inc. v. Cox*, 922 S.W.2d 327 (Ark. 1996); *Missouri Pac. R.R. Co. v. Arkansas Sheriff's Boys' Ranch*, 655 S.W.2d 389 (Ark. 1983). The third case cited in the paragraph struck down a punitive damages award separately under both state and federal standards. *Advocat, Inc. v. Sauer*, 111 S.W.3d 346, 357-59 (Ark. 2003) (state "shock the conscience"), 359-63 (federal due process), *cert. denied*, 124 S.Ct. 532 (2003).

Ninth Circuit's opinion in *In re Exxon Valdez*, 270 F.3d 1215 (9th Cir. 2001). In reality, both courts recognized and followed this Court's holding that the constitutional due process analysis under the *Gore/State Farm* factors should be performed using *de novo* review. *See Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 435 (2001) ("[T]he courts of appeals must review the proportionality determination '*de novo*' . . . ."); *In re Exxon Valdez*, 270 F.3d at 1240 ("'[C]ourts of appeal should apply a de novo standard of review . . . .'" (citation omitted)); *Barber*, 2004 WL 352525 at 14, Pet. App. 31a ("A *Gore* analysis is to be undertaken by the appellate court *de novo*."). The passing reference to state standards is irrelevant to the court's five-page analysis of the *Gore/State Farm* elements, which accorded no deference to the jury or the trial court. *See Barber*, 2004 WL 352525 at 14-16, Pet. App. 31a-36a; *infra* Section I.C.

In addition, the railroad distorts the holding of *Johansen v. Combustion Engineering, Inc.*, 170 F.3d 1320 (11th Cir. 1999), *cert. denied, sub nom. Combustion Eng'g, Inc. v. McGill*, 528 U.S. 931 (1999), which does not apply to the facts of this case. *Johansen* merely noted that where an actual fine is imposed for the same conduct that is at issue in civil litigation, that fine is generally "the most relevant comparison" for purposes of the third *Gore/State Farm* factor. *Id.* at 1337 & n. 34. And even when such a fine is imposed and adequately reflects the strength of state interests, *Johansen* did not hold that the penalty rigidly caps punitive damages. Instead, the court upheld a $4.35 million punitive damages award in the context of a $10,000 fine and $47,000 in compensatory damages because "the Georgia statutes provided fair notice . . . that [the defendant] might be subject to a substantial penalty." *Id.* at 1339. Since no penalty was imposed in this specific case, the Arkansas Supreme Court's decision to uphold the award in the face of potential state and federal penalties was consistent with both *Johansen* and this Court's directive to evaluate the amount of punitive damages in light of the "civil penalties

authorized or imposed in comparable cases." *Gore*, 517 U.S. at 575.[3] *See also infra* Section I.C (discussing the merits).

C. The Arkansas Supreme Court Properly Applied The *State Farm* Analysis.

Even were it appropriate for this Court to take the extraordinary step of granting certiorari to review a factbound claim of error in the application of settled law, *see* S. Ct. R. 10, Union Pacific's various claims of error are wrong. The Arkansas Supreme Court has carefully applied the *Gore/State Farm* analysis in the past to reduce excessive punitive damages awards, *see Advocat, Inc. v. Sauer*, 111 S.W.3d 346 (Ark. 2003), *cert. denied*, 124 S.Ct. 532 (2003). In contrast, the Arkansas Supreme Court properly concluded that such action was not warranted on the facts of this case.

To begin with "the most important indicium of the reasonableness of a punitive damages award," *Gore*, 517 U.S. at 575, the degree of reprehensibility of Union Pacific's conduct was significant. Most of the reprehensibility factors identified in *State Farm* are present in this case: (1) the harm caused was severe physical injury and death, rather than mere economic damage; (2) the railroad's conduct evinced such a reckless indifference to public health and safety as to warrant the inference of intentional malice; and (3) the railroad's conduct involved the failure to respond to more than a dozen warnings by its own employees, local

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[3] Indeed, subsequent Eleventh Circuit cases have applied an analysis similar to what the Arkansas Supreme Court used in *Barber*. *See United States E.E.O.C. v. W & O, Inc.*, 213 F.3d 600 (11th Cir. 2000), *Bogle v. McClure*, 332 F.3d 1347 (11th Cir. 2003), *Copley v. Bax Global, Inc.*, 97 F. Supp. 2d 1164 (S.D. Fla. 2000), *Lambert v. Fulton County*, 97 F. Supp. 2d 1380 (N.D. Ga. 2000), *Register v. Rus of Auburn*, 193 F. Supp. 2d 1273 (M.D. Ala. 2002).

residents, and public officials that the crossing presented a severe hazard. *See* 538 U.S. at 419. Particularly in light of the fact that Union Pacific posted flagmen to ensure that its own employees and equipment could use the crossing safely but failed to afford any protections to the motoring public, the jury and the Arkansas Supreme Court quite reasonably concluded that the railroad's conduct was "indicative of a high degree of reprehensibility." *Barber*, 2004 WL 352525 at 15, Pet. App. 33a.[4]

As for the proportion of punitive to compensatory damages, the Arkansas court properly noted that a ratio of slightly less than 5-to-1 was consistent with this Court's general guidance before moving on to focus on the third *Gore/State Farm* factor. *Id.* ("Most recently, the Supreme Court has held that '[s]ingle-digit multipliers are more likely

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[4] Union Pacific asserts that the conduct at issue in the case "even viewed in its worst light[] was barely more culpable than simple negligence," Pet. 14, but ignores the fact that under the jury instructions and Arkansas law, the jury could only award punitive damages if it found that the railroad acted with malice or with such reckless disregard for probable injury that malice could be inferred. Tr. 6550-6551. *See also Missouri Pac. R.R. Co. v. Mackey*, 760 S.W.2d 59, 63 (Ark. 1988) (noting that punitive damages must be based on a finding that the defendant acted intentionally or "with such conscious indifference to the consequences of [its] acts that malice may be inferred," and emphasizing that gross negligence is not sufficient). It must necessarily be presumed that the jury obeyed those instructions, *see Richardson v. Marsh*, 481 U.S. 200, 206 (1987) (describing "the almost invariable assumption of the law that jurors follow their instructions"); *Pearson v. Henrickson*, 983 S.W.2d 419 (Ark. 1999) (same), and the jury's factual findings as to motive are entitled to deference. *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 440 & n.14 (2001). Indeed, the Petition concedes this at another point. *See* Pet. 26-27 & n.17 ("Presumably any facts explicitly found by the jury on a special verdict form qualify for deference, as do facts necessarily implied by the jury's verdict on liability or its finding authorizing punitive damages.").

to comport with due process, while still achieving the State's goals of deterrence and retribution . . . .'" (quoting *State Farm*, 538 U.S. at 425)).[5]

Even if Union Pacific had not waived reliance on *State Farm*'s discussion of 1-to-1 ratios, the Arkansas court would have been fully justified in upholding the award. *State Farm* suggested that where compensatory damages are "substantial," "a lesser ratio [of punitive damages], perhaps only equal to compensatory damages" may reach constitutional limits, but immediately went on to note that "[t]he precise award in any case, of course, must be based upon the facts and circumstances of the defendant's conduct *and* the harm to the plaintiff." 538 U.S. at 425 (emphasis added). Accordingly, the Court's analysis of whether the $1 million compensatory award at issue in *State Farm* was "substantial" focused on case-specific factors such as the nature of the plaintiffs' injuries and the fact that punitive damages would be largely duplicative of compensatory damages. *Id.* at 426. In this case, it is not at all clear that in light of the defendant's conduct (repeated and deliberate failure to correct a known public safety hazard) and the harm to the plaintiff (permanent debilitation and chronic pain), a $5 million compensatory award is so "substantial" as to displace the general rule that single-digit multipliers satisfy due process concerns. *See id.* at 425.[6]

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[5] The court's statement that "'breathtaking'" disparities are impermissible quoted *Advocat, Inc. v. Sauer*, 111 S.W.3d 346, 361 (Ark. 2003), *cert. denied*, 124 S.Ct. 532 (2003), which itself quoted *Gore*, 517 U.S. at 583. 2004 WL 352525 at 15, Pet. App. 33a.

[6] For the same reason, Union Pacific's citation of cases involving compensatory damages awards exceeding $200,000 as supporting its assertion that lower courts have misunderstood *State Farm*'s directive is of no assistance because it ignores *State Farm*'s fact-specific "substantiality" analysis. Pet. 15-17 n.8.

Moreover, even where compensatory damages do meet the "substantial" threshold, *State Farm*'s suggestion that a 1-to-1 ratio may approach constitutional limits cannot serve as the absolute prescription that Union Pacific now suggests. If it did, the ratio analysis would replace reprehensibility as "the most important indicium of the reasonableness of a punitive damages award," *Gore*, 517 U.S. at 575, and impose an absolute ceiling in certain cases without regard for whether state goals of deterrence and retribution have been achieved, *State Farm*, 538 U.S. at 425; *Gore*, 517 U.S. at 568. Because such considerations cannot be resolved without weighing individual circumstances and all three of the *Gore/State Farm* elements, the Court has consistently refused to read the general command of due process as imposing the "bright-line ratio[s]" on which Union Pacific insists. *State Farm*, 538 U.S. at 425. *See also Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 18 (1991) ("We need not, and indeed we cannot, draw a mathematical bright line . . . .").

With regard to the final factor, the Arkansas court properly considered "'legislative judgments concerning appropriate sanctions for the conduct at issue,'" *Gore*, 517 U.S. at 583 (citation omitted), by comparing the punitive damages award to "civil penalties authorized or imposed in comparable cases." *Id.* at 575. Given that federal regulations explicitly provide that each day a violation continues constitutes a separate offense, the court estimated—based on a maximum federal penalty of $22,000 and state penalty of $500—that the potential liability for noncompliance over the period Union Pacific controlled the tracks was nearly $10 million. 2004 WL 32525 at 16, Pet. App. 35a-36a. The court's conclusion that the total civil penalties authorized by law were sufficiently comparable to uphold the punitive damages award is far more conservative than the Eleventh Circuit's opinion in *Johansen*, on which Union Pacific relies. *Johansen v. Combustion Eng'g, Inc.*,

170 F.3d 1320, 1339 (11th Cir. 1999) (upholding a $4.35 million punitive award based on the conclusion that a $10,000 maximum fine "provided fair notice . . . that [defendant] might be subject to a substantial penalty"), *cert. denied, sub nom. Combustion Eng'g, Inc. v. McGill*, 528 U.S. 931 (1999). While Union Pacific attempts to undermine the Arkansas court's holding by arguing that it failed to consider other jury awards and actual Federal Railroad Administration fines, this argument is also waived on account of the railroad's failure to raise these issues below.[7]

Thus, while the Petition distorts the record to suggest that the Arkansas Supreme Court based its *State Farm* decision primarily on the railroad's destruction of evidence and testimony about out-of-jurisdiction conduct, the court properly concluded that the punitive damages were not "grossly excessive" under any of the *Gore/State Farm* elements.

In any event, the spoliation instruction given below stands as a further reason why this case is ill-suited for

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[7] The Petition attempts a comparison with the award in *Brown v. Missouri Pacific Railroad*, 703 F.2d 1050 (8th Cir. 1983), Pet. 9 & n.5, but the railroad only cited this case to the Arkansas Supreme Court for purposes of analyzing reprehensibility under state common-law standards. Abst. 231-232. *Cf. Adams v. Robertson*, 520 U.S. 83, 88 (1997) (per curiam) ("The discussion of 'a federal case, in the midst of an unrelated argument, is insufficient to inform a state court that it has been presented with a claim.'" (citation omitted)). Similarly, Union Pacific neither cited *Johansen* nor provided the Arkansas Supreme Court with any evidence of actual federal fine levels. Abst. 232-233; Reply Br. 12-13. Had the railroad presented the arguments below that it includes now in its Petition, the Barbers would have had a full opportunity to respond to the appropriateness of comparing the award to fines computed over a period of years and/or fines applied to hazardous material violations. This Court's general rule barring arguments that were not presented to the courts below is designed to prevent just this type of sandbagging.

review in this Court. An instruction permitting the jury to infer that the contents of intentionally destroyed records would support the opposing party's case is a routine instruction—one with which Union Pacific is quite familiar. *See, e.g., Stevenson v. Union Pac. RR. Co.*, 204 F.R.D. 425 (E.D. Ark. 2001), *aff'd in relevant part*, 354 F.3d 739 (8th Cir. 2004) (upholding the use of such instruction in connection with Union Pacific's practice of recording over voice tapes relating to serious accidents and its failure to preserve track inspection records after receiving discovery requests); *Privett v. Union Pac. R.R. Co.*, No. 3:99cv00110, slip op. at 9 (E.D. Ark. Jan. 13, 2003) (use of instruction with regard to destruction of voice tapes). The railroad never appealed the issuance of the instruction in this case, nor argued to the Arkansas Supreme Court that it raised any issue under *State Farm*.

Accordingly, as the case comes before this Court, the evidentiary record must be viewed through the lens of the properly given instruction—that jurors could infer that the records destroyed by Union Pacific would have further supported the Barbers' claims that the railroad had acted with conscious disregard of a known risk to public safety. The already significant evidence concerning Union Pacific's deliberate failure to correct a known safety hazard, viewed in light of this instruction, further supports the Arkansas Supreme Court's reprehensibility analysis, and makes this case a particularly poor candidate for this Court's review.[8]

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[8] Contrary to Union Pacific's implication, the trial court's instructions never suggested that the jury should award punitive damages simply *because* the railroad destroyed evidence. The trial court specifically rejected this contention and explained that it sent the punitive damages issue to the jury because of the evidence concerning reprehensibility (i.e., evidence on vegetation, ignored warnings, and related policies). Pet. App. 48a.

Finally, with regard to the evidence of Union Pacific's policy of refusing to make safety enhancements to crossings not covered by federal and state enhancement programs, the use of such evidence was entirely consistent with *State Farm*'s statement that "out-of-state conduct may be probative when it demonstrates the deliberateness and culpability of the defendant's action in the State where it is tortuous, but *that conduct must have a nexus to the specific harm suffered by the plaintiff.... A defendant should be punished for the conduct that harmed the plaintiff*, not for being an unsavory individual or business." *State Farm*, 538 U.S. at 422-23 (emphasis added).[9]

Moreover, the railroad misreads *State Farm*'s warning that "a defendant's dissimilar acts, independent from the acts upon which liability was premised, may not serve as the basis for punitive damages." 538 U.S. at 422. That statement referred to other types of substantive misconduct perpetrated against other State Farm customers, not the concealment of evidence reflecting on the course of conduct at issue in the case. In fact, the Court went on to suggest that State Farm's failure to report a prior $100 million punitive damages award could potentially have been relevant to the reprehensibility analysis if the prior case had involved the same type of misconduct alleged by the plaintiffs. *Id.* at 427. *See also id.* at 423 (recidivists more reprehensible because they have repeated misconduct known to be unlawful). Similarly here, the railroad's destruction of evidence reflecting its knowledge of and reaction to crossing conditions could support an inference that the records would have illustrated Union Pacific's deliberate disregard of a known risk to public safety.

[9] Union Pacific also asserts that *State Farm*'s general prohibition against basing punitive damages awards on out-of-state conduct should extend to prohibit reliance on conduct that was purportedly lawful under preemptive federal statutes. Pet. 19-21. This argument also is waived because the railroad neither challenged the punitive damages award on this basis before the Arkansas Supreme Court, nor raised the question in its challenges to evidence concerning the issuance of slow orders either in initial briefing or in the petition for rehearing. As discussed *infra* in

Here, the evidence directly related to Union Pacific's response to requests to improve abnormally hazardous crossings, including the crossing at County Road 123. *Cf. CSX Transp., Inc. v. Palank*, 743 So. 2d 556 (Fla. Dist. Ct. App. 1999), *cert. denied*, 531 U.S. 822 (2000) (company policies and budgeting led to failure to inspect defective switch causing derailment). Unlike *State Farm*, the crossing policy evidence did not involve "conduct that bore no relation to the [plaintiffs'] harm," but rather the exact conduct at issue in the case. *State Farm*, 538 U.S. at 422. Moreover, this case does not raise the same type of concerns that this Court expressed in *State Farm* about the plaintiffs' arguments and the lower courts' treatment of out-of-state evidence. The Barbers did not repeatedly urge the jury to hold Union Pacific "'accountable for what it's doing across the country, which is the purpose of punitive damages,'" and the appellate court did not uphold the award on the basis of "tangential" issues and "unrelated testimony." *Id.* at 420-21 (citation omitted), 424.

Instead, the evidence added to the already substantial showing of reprehensibility by suggesting that Union Pacific's actions in this case reflected not just an intentional disregard for public safety, but a cold financial calculation that could only be deterred by imposing damages beyond the range of compensatory damages typically awarded in cases involving serious injury or death.[10] *See Brown v. Missouri*

Section II, this case presents an unsuitable vehicle for reviewing federal preemption issues.

[10] As discussed in the Counter Statement of the Case, the policy evidence came from several sources. Dr. Levine's testimony regarding his experiences with Union Pacific and other railroads through his prior work at the Association of American Railroads was properly introduced to establish his credentials and familiarity with Union Pacific in particular. The fact that Dr. Levine stated that he criticized all railroads for not

Pac. R.R., 703 F.2d 1050, 1053 (8th Cir. 1983) ("The Arkansas Supreme Court will allow punitive damages to deter a defendant from deciding it is cheaper to be sued and pay compensatory damages than to remedy a dangerous condition.").

II. THE ARKANSAS SUPREME COURT PROPERLY RESOLVED UNION PACIFIC'S CHALLENGE TO THE SLOW ORDER EVIDENCE AS IT WAS PRESENTED BELOW.

The Petition asserts that imposing liability on Union Pacific on account of the failure to issue "slow orders" for trains traveling through the crossing at County Road 123 is federally preempted, and that both the general verdict and the punitive damages award must therefore be overturned. It is not even argued, however, that there is any division of authority in the lower courts on this issue, or that the issue is in any way independently certworthy. In this regard, the Petition seeks mere error correction.

Moreover, the railroad's claim of clear error is both incorrect and inadequately preserved. The record on this issue, and its presentation to the Arkansas Supreme Court on review, was sufficiently muddled that the Arkansas Supreme Court quite properly construed Union Pacific's brief as simply challenging the sufficiency of the evidence.

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spending enough money on grade crossing safety in response to a cross examination question, Abst. 136, hardly invalidates his assessment of Union Pacific's financial and policy materials or the Union Pacific employees' testimony regarding policies and practices. As for statistics referenced in opening argument that were not ultimately introduced at trial, the trial court provided an appropriate cautionary instruction. Tr. 6540. *See also, e.g., Nobles v. Casebier*, 938 S.W.2d 849, 851 (Ark. 1997) (instruction obviates need for new trial).

Because the Arkansas court's resolution of that sufficiency of evidence challenge was proper, there can be no serious contention that this issue merits this Court's review.

The record in this case concerning speed and slow orders is, in a word, a jumble. In response to Union Pacific's motion to dismiss and motions in limine, the Barbers presented three alternative arguments: (1) that although claims of excessive speed were preempted, their claim that the railroad negligently failed to issue a slow order was not; (2) that even if the claim that state law required Union Pacific to issue a slow order was preempted, the railroad nevertheless violated a *federal* duty to issue a slow order; and (3) that the evidence was relevant because the railroad may have in fact issued slow orders evidencing knowledge of hazardous conditions and then concealed that evidence. Abst. 21-28.[11]

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[11] This Court has held that federal speed rules generally preempt common law negligence standards, but that the Federal Railroad Safety Act explicitly exempts state standards governing "'essentially local safety hazard[s]'" from such preemption. *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 662 (1993) (quoting 45 U.S.C. § 434, now codified as amended at 49 U.S.C. § 20106). *Easterwood* also reserved the question of whether, aside from direct claims of excessive speed, "related tort law duties, such as the duty to slow or stop a train to avoid a specific, individual hazard" are federally preempted. *Id.* at 675 n.15. At least one lower court has correctly held that failure to issue slow orders required under federal standards can be the basis for negligence actions. *See Stone v. CSX Transp., Inc.*, 37 F. Supp. 2d 789 (S.D. W. Va. 1999).

Easterwood also held that state negligence claims are preempted when federal funds "participate" in the installation of warning devices at a particular crossing. 507 U.S. at 671-73. *See also Norfolk S. Ry. Co. v. Shanklin*, 529 U.S. 344 (2000). No federal funds were used at the crossing over County Road 123, Abst. 129, so arguments and evidence regarding Union Pacific's failure to install additional warning devices were proper.

The trial court permitted the Barbers to introduce certain evidence concerning the issuance of slow orders, but its reasoning was concededly opaque.[12] The trial court's only specific instruction to the jury concerning speed or slow orders was:

> There was in force in the United States and the State of Arkansas at the time of the occurrence, [a] federal regulation[] which provided . . . the federally authorized speed for this track on the date of the accident was 60 miles per hour. A violation of [this] regulation[], although not necessarily negligence, is evidence of negligence to be considered by you along with all the other facts and circumstances in the case.

Tr. 6546-6547. The court never stated that Union Pacific had a duty to issue slow orders, and warned jurors that "[y]ou should not consider any rule of law [with] which you may be familiar unless it is included in my instructions." Tr. 6539.

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[12] Evidence concerning the slow orders was relevant to several issues in the case, including the track conditions that caused or contributed to the accident, Union Pacific's knowledge of such conditions, the railroad's course of conduct in response to such knowledge, and spoliation of evidence. The trial court's assessment of each of the Barbers' three arguments was somewhat unclear. *See, e.g.*, Abst. 41 ("[O]ther than the issue involving slow orders, whether they should or shouldn't issue them or maybe did, as far as the actual speed itself, it's preempted."), 99 ("I know that's preempted, unless there's a slow order in effect. But even though there may be case law to that effect, if a slow order is in effect internally because there's something wrong with the track, that would be relevant and go to the issue of negligence."), 123 (permitting testimony that "[t]here was a negligent failure to slow-order the tracks" based on the condition of the ties), 167 ("My ruling on the motion in limine was that as to the issue of speed, that it is preempted, and the only way the court would allow that issue would be if there was some type of slow order. . . . I'm not changing my ruling, I'm just repeating it.").

Union Pacific neither objected to the speed instruction nor requested any other instruction with respect to slow orders.

On appeal, Union Pacific presented the slow order issue to the Arkansas Supreme Court under the heading "The Circuit Court erred in denying the motion for a directed verdict on the claim of negligent failure to issue a slow order and on the claim that the crossing was abnormally dangerous," followed by a general statement that the applicable standard of review "is whether the verdict is supported by substantial evidence." Abst. 222. Union Pacific went on to discuss two of the Barbers' three arguments for why the slow order evidence was proper, and then concluded with the statement, "the court should have granted UP's motion in limine and motion for a directed verdict on the claim that UP negligently failed to issue a slow order." Abst. 224.

The Arkansas Supreme Court properly evaluated Union Pacific's arguments as presented. *See* Ark. S. Ct. R. 4-2(7) ("Arguments shall be presented under subheadings numbered to correspond to the outline of points to be relied upon. For each issue, the applicable standard of review shall be concisely stated at the beginning of the discussion of the issue."). The court noted that the railroad's arguments regarding slow orders and abnormally dangerous crossings did "not challenge the sufficiency of the evidence to support the general verdict of negligence. . . . [but rather] challenge[d] the sufficiency of the evidence on two of several theories that support the general verdict." *Barber*, 2004 WL 352525 at 8, Pet. App. 19a-20a. Emphasizing that Union Pacific had not challenged the jury instructions, the court distinguished a string of cases under Arkansas law requiring reversal when a jury is presented with an erroneous

instruction concerning one of several legal theories presented in a case. *Id.* (citing, e.g., *Advocat, Inc. v. Sauer*, 111 S.W.3d 346 (Ark. 2003), *cert. denied*, 124 S.Ct. 532 (2003)).[13] Instead, the court applied an earlier decision holding that it would not reverse based on a sufficiency of evidence challenge to one particular theory of negligence when the evidence was sufficient to support the verdict on other negligence theories presented to the jury. *Id.* (citing *Union Pac. R.R. Co. v. Sharp*, 952 S.W.2d 658 (Ark. 1997)). Because the evidence concerning violation of state vegetation statutes was sufficient to support the verdict, the court affirmed the trial court's judgment. *Id.*

Union Pacific, which had unsuccessfully sought leave to file supplemental authorities on this issue after oral argument in the Arkansas Supreme Court, then filed a petition for rehearing characterizing its earlier challenge as the "practical equivalent of a challenge to the way the jury was instructed on the law." Reh'g Pet. 4. The railroad also asserted for the first time that because the case involved federal issues, it should be governed by federal standards requiring reversal of general verdicts if legal error infected any theory on which the jury may have relied. Reh'g Pet. 9 (characterizing *Sharp* as a novel rule of state law). The

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[13] Indeed, the court seemed implicitly to question whether the slow order issue had actually been presented to the jury as a theory of negligence in the case, since it identified the Barbers' five theories of negligence as (1) violation of Arkansas statutes on vegetation control; (2) the presence of an abnormally dangerous crossing; (3) failure to sound the train's horn; (4) failure to keep a proper lookout; and (5) violation of federal regulations requiring railroads to instruct their employees concerning operating rules, time tables, and time table special instructions. *Barber*, 2004 WL 352525 at 9, Pet. App. 19a. The failure to instruct theory was based on evidence concerning railroad procedures for the reporting of safety problems, keeping a proper lookout, and use of the train's horn. *See* 3-SAB, 4-SAB, 6-SAB.

Arkansas Supreme Court denied the petition without an opinion.

Nothing here merits review in this Court. *First*, it is not even argued that there is any division of authority on this question. No serious contention is made that this issue is independently certworthy.

Second, on account of Union Pacific's failure properly to preserve and present the arguments below that it now attempts to advance, there is no clear ruling on the merits from either court below for this Court to review. The railroad failed to clarify the basis of the trial court's ruling and failed to object to the jury instructions on speed or request an instruction on slow orders. On appeal, Union Pacific framed its challenge as focusing on the sufficiency of the evidence.[14] The railroad also failed to raise its new arguments regarding federal procedural preemption until its petition for rehearing, which is too late.[15] *See, e.g., Pannell*

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[14] It also failed to assert to the Arkansas Supreme Court that evidence of conduct that is allegedly governed by federal standards cannot be used to support a punitive damages award under *State Farm*. *See supra* note 6.

[15] Union Pacific's arguments are also unpersuasive on the merits. The "general rule, 'bottomed deeply in belief in the importance of state control of state judicial procedure, is that federal law takes the state courts as it finds them.'" *Howlett v. Rose*, 496 U.S. 356, 372 (1990) (citation omitted). The railroad invokes a narrow exception found in cases that have overridden local procedural rules concerning pleading requirements, exhaustion, and similar threshold issues that "burden[] the exercise of [a] federal right" in a manner that is inconsistent with congressional intent. *See, e.g., Felder v. Casey*, 487 U.S. 131 (1988); *Brown v. Western Ry. of Ala.*, 338 U.S. 294 (1950). With regard to "neutral state Rule[s] regarding the administration of the courts," however, this Court applies a strengthened presumption against preemption. *Johnson v. Fankell*, 520 U.S. 911, 918 (1997).

The Arkansas court's treatment of sufficiency of evidence challenges where there is independent evidence to support liability under another

v. State, 897 S.W.2d. 552 (Ark. 1995) (per curiam) (petitions for rehearing shall not encompass new facts, new briefs, and new arguments); *see also Adams v. Robertson*, 520 U.S. 83, 89 n.3 (1997) (per curiam) ("[W]e have generally refused to consider issues raised clearly for the first time in a petition for rehearing when the state court is silent on the question.").

Third, the Arkansas Supreme Court properly resolved the slow order issue as it was framed by Union Pacific at the time. In the context of a challenge to the sufficiency of evidence on one of several theories of negligence, the court's ruling was consistent not only with its own precedent,[16] but also with this Court's holding in *Griffin v. United States*, 502 U.S. 46, 56 (1992) (rejecting the contention that the Court should set aside a general verdict because one of the possible bases of conviction was supported by insufficient evidence, since jurors are well equipped to evaluate factual inadequacies for themselves).

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legal theory is a neutral administrative rule entitled to federal respect. The rule does not discriminate between federal and state claims. *Cf. Howlett*, 496 U.S. at 380; *Felder*, 487 U.S. at 140-45. Nor does a rule concerning appellate review of *evidentiary* challenges to plaintiffs' theories of liability burden railroads' federal rights to raise *legal* challenges to those same theories on grounds of preemption. *Cf. Fankell*, 520 U.S. at 921 (rule regarding availability of interlocutory appeal does not burden defendants' substantive ability to raise sovereign immunity defense under federal law). In any event, where the holding was consistent with this Court's own precedent, *see infra*, the rule cannot be characterized as "'frequently and predictably produc[ing] different outcomes'" than would occur in federal court. *Fankell*, 520 U.S. at 920-21 (citation omitted).

[16] *See, e.g., Union Pac. R.R. Co. v. Sharp*, 952 S.W.2d 658 (Ark. 1997); *W.M. Bashlin Co. v. Smith*, 643 S.W.2d 526 (Ark. 1983); *Franklin v. State*, 240 S.W. 708 (Ark. 1922).

Thus, much like Union Pacific's due process arguments, the railroad did not properly present and preserve below the arguments it now advances to this Court. Because there is no contention that this issue is one on which the lower courts are divided, and because the garbled record in this case renders it a particularly poor candidate for this Court's review of the underlying preemption arguments, the Petition should be denied.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

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